UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SR.526
8 June 1994

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-seventh session

SUMMARY RECORD OF THE 526th MEETING

Held at Headquarters, New York,
on Friday, 3 June 1994, at 10 a.m.

Chairman: Mr. MORAN (Spain)

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The meeting was called to order at 10.10 a.m.

ELECTION OF OFFICERS (continued)

1. Mr. Tuvayanond (Thailand) was elected Rapporteur by acclamation.

NEW INTERNATIONAL ECONOMIC ORDER: PROCUREMENT (continued) (A/CN.9/392)

Article 41 bis

2. Mr. LEVY (Canada) read out the following revised version of article 41 bis, paragraphs (3) and (4), of the draft UNCITRAL Model Law on Procurement of Goods, Construction and Services:

> "(3) (Subject to approval by ... (the enacting State designates an organ to issue the approval),) for reasons of economy and efficiency, the procuring entity need not apply the provisions of paragraph (2) of this article when it determines:
>
> (a) that the services to be procured are available only from a limited number of suppliers or contractors, provided that it solicits proposals from all those suppliers or contractors; or
>
> (b) that the time and cost required to examine and evaluate a large number of proposals would be disproportionate to the value of the services to be procured, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition; or
>
> (c) that the nature of the services to be procured is highly complex, specialized, intellectual, technical or confidential, provided that it solicits proposals from a sufficient number of suppliers or contractors to ensure effective competition.
>
> (4) The procuring entity shall provide the request for proposals, or the prequalification documents, to suppliers or contractors in accordance with the procedures and requirements specified in the notice, or directly to the suppliers or contractors participating in the procurement pursuant to the provisions of paragraph (3). The price that the procuring entity may charge for the request for proposals or the prequalification documents shall reflect only the cost of printing and providing them to suppliers or contractors. If prequalification proceedings have been engaged in, the procuring entity shall provide the request for proposals to each supplier or contractor that has been prequalified and that pays the price charged, if any."

3. The text had been prepared by an informal drafting group on the basis of the Commission's discussions of the previous day. The drafting group further proposed that article 11 should be amended to provide that a procuring entity should record any determination made pursuant to paragraph (3) of article 41 bis in the record of procurement proceedings.

4. Mr. TUVAYANOND (Thailand) said that the revised text represented a considerable improvement over the text contained in the annex to document A/CN.9/392 and went a long way towards accommodating his delegation's concerns over the question of direct solicitation. His delegation would, in principle, accept the new draft, provided that it were made available in writing for more careful scrutiny and that the ability of procurement entities to engage in direct solicitation was clearly stated in the official record of the meeting.

5. Mr. KLEIN (Observer, Inter-American Development Bank) said that, while the revised versions of paragraphs 3(a) and 3(b) were an improvement over the previous version, paragraph 3(c) provided far too many exceptions to the rule set forth in paragraph 2. The only grounds on which an exception would be justified would be where the service being sought was of a confidential nature. Otherwise, the Model Law would be eliminating the need for international publication of notices on a wide range of services.

6. The CHAIRMAN said that it might be possible for the drafting group to cut down on the number of adjectives used in paragraph 3(c)O to describe the nature of the services to be procured.

7. Mr. JAMES (United Kingdom) said that he agreed with the Observer from the Inter-American Development Bank that the only appropriate adjective in revised paragraph 3(c) was "confidential". The inclusion of the provisions for the other exceptions in that subparagraph would enable procurement entities to circumvent the need for the international publication of notices in precisely those cases where notice was most necessary. Moreover, such broad exceptions were contrary to the spirit of the Commission's work over the previous five years, the aim of which was to ensure the widest possible publication. He was also concerned about the appropriateness of referring to the Drafting Group matters which involved substantive and not merely drafting or editorial points.

8. Mr. CHATURVEDI (India) requested that further consideration of the proposed text be deferred in order to give his delegation time to study it. The significance of the adjective "intellectual" was not clear to him and he would be interested to learn why the reference to "confidential" services had been included.

9. Turning to article 41 bis, paragraph (1), he noted that notices were usually published in newspapers and not in official gazettes or other official publications, adding that the entire second sentence needed to be clarified.

10. Mr. GRIFFITH (Observer for Australia) agreed with the Observer for the Inter-American Development Bank that revised paragraph 3(c) created too many exceptions to the primary rule established in paragraph (2); it was also counter to the principle of transparency. He considered, finally, that the revised draft raised substantive issues which could not be resolved by the drafting group.

11. Mr. TUVAYANOND (Thailand) said that many of his delegation's concerns had not been met, adding that decisions regarding procurement of services were subject to political considerations, and that such considerations were extremely important. For raisons d'État, his Government did not wish to place contracts with hostile countries. Since no provision had been made for any escape clause

(Mr. Tuvayanond, Thailand)

it was vital that the Model Law should provide for the possibility of direct solicitation, particularly where there was need for confidentiality and confidence in the competence of the supplier. His delegation would have great difficulties unless that concern was accommodated.

12. Mr. WESTPHAL (Germany) said that it had emerged from recent discussions that the issues facing the Commission were highly political. The members of the Commission did not all agree that competition should be the rule in procurement. Such considerations did not relate only to the procurement of services, and the Commission might well have usefully considered them when adopting the Model Law on Procurement of Goods and Construction.

13. In reality, reasons could always be found for single-source procurement where a State thought it important; in fact the draft Model Law allowed for single-source procurement under article 20. In the recent agreement on procurement in the area of services, which had been adopted in the context of the Uruguay Round, the same approach had been taken as in the case of goods and construction. In view of those developments any delay by the Commission in adopting the draft Model Law would lessen the value of its work. Indeed some Eastern European countries were already devising their own regulations.

14. Mr. CHOUKRI SBAI (Morocco) recalled that his delegation had earlier requested the deletion of paragraph 3 (c); the reference to ensuring effective competition should certainly be deleted, since it opened up the possibility of abuse. It would be better to reword the paragraph along the lines of:

> "Where the nature of the services to be procured requires direct tendering, the tenders should come from a sufficient number of suppliers to allow for a certain balance in the competition."

15. There were some areas where only certain suppliers would be appropriate, for example, the restoration of historical monuments or of mosques. It was important to refer to the nature of the service to be procured.

16. Mr. WALLACE (United States of America) said that the Commission debate related essentially to the nature of the procurement of services rather than to article 41 bis per se. Regarding the Uruguay Round, the level of specificity was very different in the case of the General Agreement on Tariffs and Trade. With respect to raisons d'État, the point had been discussed in the Working Group, when dealing with articles 1 and 2, in connection with exclusions of kinds of procurement. The question of whether whole classes should be excluded was not, however, the same as the question of whether direct solicitation should be allowed under article 41 bis, since there might be a desire not to exclude a category from the Model Law but merely to be exempted from the notice requirement, where, for example, there was a need for confidentiality. The concerns raised by the representative of Thailand could be addressed by excluding certain services from the scope of the draft Model Law under articles 1 and 2, and by refining article 41 bis, paragraph 3 (c).

17. Mr. CHATURVEDI (India) said that he shared the concerns expressed by the representative of Thailand regarding nationality. The issue was not just a matter of policy, since, in his country, it could actually be illegal to trade

(Mr. Chaturvedi, India)

with enemy countries. The proper place for such exclusions was, however, article 14 (1), which dealt with obstacles based on nationality. With respect to the exclusions in paragraphs 3 (a), (b) and (c), there was no reason to distinguish between international and domestic publication since the same rationale would apply. Clearly, with respect to paragraph 3 (c), the question of the nature of the services was extremely important.

18. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he agreed with the representative of China on the need for flexibility regarding publicity in connection with services. The main question was whether paragraph 3 (c) addressed an issue not covered elsewhere; if it did not, it could be deleted.

19. Mr. HUNJA (International Trade Law Branch) said that there were indications in the Commission that direct solicitation should be allowed in connection with services, but there was a problem regarding the nature of the services. The question went beyond the scope of paragraphs 1 and 2 of article 41 bis. If direct solicitation was allowed, there was no need to publish any notice, since the suppliers would be approached directly. If the Commission agreed that direct solicitation should be allowed for some services under paragraph 3 (c), the description of the services could be left to the drafting group.

The meeting was suspended at 11.40 a.m. and resumed at 12.05 p.m.

20. Mr. TUVAYANOND (Thailand) said that members seemed to be focusing too much on the publication requirement when, in reality, the main issue was that of direct solicitation. For that reason, his delegation firmly supported the retention of paragraph 3(c). In addition to confidentiality, there were other special circumstances that required direct solicitation (considerations of national interest for example) which were not covered by the single source procurement procedures. Therefore, his delegation believed it was essential to consider national interests and to ensure transparency in procurement to avoid any possibility of abuse of power by the authorities concerned.

21. Mr. LEVY (Canada) pointed out there were circumstances when direct solicitation was the only solution, and for that reason, it was necessary to retain paragraph 3(c). He suggested that, in addition to containing a reference to confidentiality or national interests, paragraph 3(c) should say something about the nature of the services not warranting a broad solicitation. Another possibility would be to insert parentheses after the reference to confidentiality and national interests so that States could elaborate further. In addition, he suggested that the introductory phrase of paragraph 3 be redrafter after the word "efficiency" to read "the procuring entity need not apply the provisions of paragraph 1 or 2 of this article and may solicit directly when it determines:".

22. Mr. JAMES (United Kingdom) said that if a reference to national interests was to be included in paragraph 3 (c), it should be made clear that the procuring entity was not obligated to apply the provisions of paragraph 2 when it determined that it was not in the national interests to do so. To simply state that the nature of the services did not warrant a broad solicitation, as suggested by the representative of Canada, would not be acceptable as it would

(Mr. James, United Kingdom)

give a procuring entity carte blanche not to advertise. In fact, advertising was essential with the new method of procurement of services, unless there was advertising that method could not be considered a public one. If the Commission was to put forward four enacting States a Model Law that contained a preferred method for the procurement of services, that method should be as public and open as possible.

23. Mr. WALLACE (United States of America) said that he agreed with most of the suggestions made by the representative of Canada. Concerning paragraph 3 (c), he concurred with the United Kingdom representative that as a preferred method it must be as public as possible and that the phrase suggested by the representative of Canada merely restated the problem. The Canadian representative's amendment could be reformulated to read: "that the services to be procured involve (confidentiality, national interest, high professional services, or whatever categories the legislature wishes to specify) provided that it solicits proposals from a sufficient number of suppliers ...". As it was very clear that solutions would differ from country to country, the best possible compromise would be to put illustrations in parentheses or to indicate that the legislature would prescribe the guidelines.

24. Mr. CHATURVEDI (India) supported the proposal made by the Canadian delegation. If he had understood him correctly, the chapeau to paragraph (3) would contain a reference to paragraphs (1) and (2) and paragraph (3) would say something about the nature of services not warranting a broad solicitation. In that connection, the United Kingdom delegation's proposal to shift the burden of proof would not be acceptable. The text proposed by the United States delegation was a very sound idea.

25. Mr. TUVAYANOND (Thailand) said that the proposals made by the representatives of Canada and the United States of America fully accommodated his delegation's concerns. As far as shifting the burden of proof was concerned, the Government was answerable to parliament for its mistakes as it ultimately decided what was good for the country.

26. Mr. SHI Zhaoyu (China) said that paragraph 3 (c) should be retained. Rather than getting bogged down in endless discussions about the adjectives to be used to qualify the nature of services, the Commission could just use the original wording "because of the nature of the services" which, in his delegation's opinion, might make it easier to reach agreement. Like the representative of Thailand, his delegation was concerned not only about the nature of services but also about retaining the message of direct solicitation in the paragraph.

27. Mr. KLEIN (Observer for the Inter-American Development Bank) said that he agreed with the amendment proposed by the United Kingdom delegation as the inclusion of the notion of confidentiality and national interests made the paragraph more restrictive; merely referring to the nature of services would leave the door open for exceptions which would then lead to all the abuses which the principles of the Model Law were meant to control.

28. Mr. AL-NASSER (Saudi Arabia), referring to paragraph 3 (c), said that the insertion of the phrase "if conditions exist which would require procurement

(Mr. Al-Nasser, Saudi Arabia)

through direct solicitation" before the particular rule concerning the nature of the services to be procured should cover the notion of confidentiality and national interests as well.

29. Mr. HERMANN (Secretary of the Commission) said that delegations should focus more on the particular circumstances than on the nature of services. He did not quite understand why there seemed to be a controversy over the burden of proof. Paragraph (3) offered an exception to the requirements of paragraphs (1) and (2) and it was therefore much more appropriate to indicate what was meant by burden of proof. Given that a number of delegations had stressed the need to ensure that procurement should be as public as possible, it was perhaps not a good idea to encourage Governments to add all kinds of reasons for not using the procedure set out in paragraphs (1) and (2).

30. Mr. SHI Zhaoyu (China) said that the Working Group had agreed in previous discussions that it was up to the various States that adopted the Model Law to decide on its scope of application and on the nature of services to be included because it was impossible to draw up an exhaustive list of all the services to which the Model Law was or was not applicable. That principle also applied to paragraph 3 (c). Such an approach would make it easier to reach agreement.

The meeting rose at 1.05 p.m.